89-202

Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

GEORGE C. NEWMAN & SONS, INC.
Petitioner,

VERSUS

WASHINGTON SUBURBAN SANITARY COMMISSION
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state agency policymaker's treatment of an obvious minority front (that is, a majority-controlled firm posing as a minority-controlled firm) as a true minority business enterprise in awarding a minority set-aside contract violates a minority bidder's right to equal protection.

2. Whether allegations that legal and contractual requirements for a state contract were waived for a majority controlled bidder but not for minority controlled bidders state a cause of action for racial discrimination.

3. Whether allegations that re-filing an administrative protest would be futile, that administrative procedures were inadequate, and that an agency had announced its hearing at the award meeting was its final disposition of the protest of that award estopped the agency from asserting failure to exhaust administrative remedies.

LIST OF PARTIES

The parties to this proceeding are: Plaintiff-Appellant George D. Newman & Sons, Inc. as Petitioner and Defendant-Appellee Washington Suburban Sanitary Commission as Respondent.

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TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

Petitioner George D. Newman & Sons, Inc. prays a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit and to determine whether waiving regulations for a white bidder while strictly binding minority bidders to regulations constitutes racial discrimination.

OPINIONS BELOW

Review is sought of the published opinion of the United States District Court for the District of Maryland, *George D. Newman & Sons, Inc. v. Washington Suburban Sanitary Commission,* 696 F.Supp. 160 (1988), reprinted herein at Appendix C

dismissing this case and the opinion of the United States Court of Appeals for the Fourth Circuit, *George D. Newman & Sons, Inc. v. Washington Suburban Sanitary Commission,* 873 F.2d 1438 (1989), reprinted herein at Appendix B affirming dismissal.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit was rendered April 14, 1989 and rehearing was denied June 5, 1989. This petition for certiorari was filed within ninety days of the denial of rehearing.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> ...No State shall...deny to any person within its jurisdiction the equal protection of the laws.

Title 42 of the United States Code, section 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make...contracts...to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like...exactions of every kind and no other.

Title 42 of the United States Code, section 1983 states:

> Every person who, under color of any...regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges,or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 of the United States Code, section 2000d states:

> No person in the United States shall, on the ground or race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title 28 of the United States Code, section 1331 states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 of the United States Code, section 1332 stated:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different states;....

Title 28 of the United States Code, section 1653 states:

> Defective allegations of jurisdiction may be amended upon terms in the trial or appellate courts.

The Washington Suburban Sanitary Commission Procurement Regulations state:

> Section 6, J.
>
> Responses to Invitations for Bids will first be evaluated to determine compliance with the bidding requirements. Secondly, they will be evaluated to determine if the goods or services offered by the bidder meet the specifications involved. Those bids which do not will be determined to be nonresponsive and will receive no further consideration.
>
> Section 11, A.
>
> Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Commission's Purchasing Agent. The protect shall be submitted in writing within fifteen (15) calendar days

> after such aggrieved person knows or should have known of the facts giving rise to the protest...

The Washington Suburban Sanitary Commission Minority Procurement Regulation states:

> The Washington Suburban Sanitary Commission is committed to increasing the participation of enterprises owned by minorities in its procurement of commodities and services...
>
> The Purchasing Agent and Minority Business Enterprise Officer will actively...identify minority owned firms...
>
> In order to meet this goal, the Purchasing Agent will utilize one or more of the following procedures:
>
> 2.) Require or recommend that a procurement contract be awarded to a minority owned firm which has submitted a bid within 10% of the low bid...
>
> 3.) Require or recommend that competitive bidding be restricted to minority-owned firms...
>
> A minority owned firm is defined as:
>
> 1. any legal entity organized to engage in commercial transactions which is...*CONTROLLED* by one or more minority persons, *AND*
>
> 2. ...which is *CERTIFIED* as minority owned by the Maryland Department of Transportation...

(emphasis added).

STATEMENT OF THE CASE

On August 17, 1988 the Washington Suburban Sanitary Commission (hereinafter "WSSC" or "Commission"), a federally funded state agency, awarded a multi-million dollar minority set-aside contract to haul waste to a white-controlled firm, Hardy & Sons Trucking, Inc. (hereinafter "Hardy"). In making the award the policy-making WSSC waived numerous significant contract and legal requirements for the white controlled firm, Hardy, while

rigidly requiring the two minority controlled bidders to meet every requirement with extreme exactitude.

For example, WSSC did not require Hardy to be controlled by minorities as required by WSSC regulations thereby forcing the minority controlled petitioner to compete with wealthy and politically powerful majority-owned corporations which they would not have otherwise done. WSSC regulations require a minority firm to be both certified as a minority firm AND controlled by minorities. Petitioner George D. Newman & Sons, Inc. submitted evidence making it plain that Hardy was a "minority front"; a firm controlled by non-minorities who had propped up former minority employees to bid on this minority set aside contract. WSSC refused to investigate or act upon the fronting allegations.

WSSC also did not require the white controlled firm, Hardy, to have an Interstate Commerce Commission hauling permit required by federal law, nor a Maryland hauling permit required by Maryland law, nor qualification to do business in Maryland required by Maryland law, nor a certificate of operation required by Virginia law, nor a spreading permit as required by Virginia law, nor the financial responsibility and integrity (Hardy's officers had criminal records) necessary for performance as required by the contract, nor Virginia county storage and disposal permits as required by Virginia law, nor an 18,000 wet ton storage facility required by the contract bid specifications. None of these requirements was waived for the minority controlled bidders. In fact, petitioner George D. Newman & Sons, Inc. met all the contract requirements at the time of award. WSSC, however, found petitioner's bid non-responsive because petitioner submitted one Maryland hauling permit WSSC had separately requested one day late; WSSC waived the same requirement for the white-controlled firm, Hardy.

Petitioner set forth the foregoing in a formal protest of the award of this minority set-aside contract to the white-controlled firm Hardy subsequent to the bid opening and within 15 days from when petitioners knew of the improprieties. While WSSC regulations refer to protest of an award, nothing in those regulations prohibit filing protest of an award prior to the award being made.

While finding the protest untimely, WSSC did state "the information and areas of concern you provided in your original protest have been examined as a part of our evaluation prior to making a recommendation for award." Despite petitioner's protest, the WSSC staff recommended award of the contract to Hardy to the Commission three times. At the August 17, 1988 public award meeting the WSSC Commission announced that their disposition of petitioners, protest would be final. Where the evidence was, as one Commissioner put it, "very clear that the man is a total front," the WSSC waived numerous contract requirements and awarded this minority set aside contract to a white-controlled firm by a vote of four white Commissioners to two black Commissioners.

Relying upon the WSSC staff's statement that it had already evaluated the facts in petitioner's protest and the Commission's statement the award meeting was the final disposition of any protest of their award to Hardy, petitioners did not refile their protest. Rather, the day following the award petitioners filed suit alleging but for WSSC's discrimination by permitting fronting and showing favoritism and WSSC's abuse of discretion in failing to follow the law and their own regulations, petitioners would have been awarded the contract. See Complaint, reprinted herein at Appendix A. Petitioners moved for a temporary restraining order which was denied due to insufficient evidence that the contract would have been awarded to petitioners. The District Court, however, did permit expedited discovery, and in response to Hardy's motion for a protective order from having its deposition taken, Judge Frederic N. Smalkin ordered,

> Motion denied, in view of plaintiff's challenge to the bona fides of deponents minority contractor status and in view of plaintiff's allegation that Hardy is controlled by non minority firms.

Hardy's deposition revealed that the president of Hardy was functionally illiterate, that the bid and correspondence campaigning for the bid submitted by Hardy were in fact prepared by non-minority firms, and that non-minorities controlled Hardy. Immediately after the deposition, WSSC moved to dismiss under Fed.R.Civ.P. 12 for failure to state a claim. Based on Hardy's filed

deposition and the affidavit of a Small Business Administration expert on small business set-aside programs that Hardy was obviously a front, petitioner's renewed their motion for a preliminary injunction and amended the complaint to include new facts.

On October 5, 1988, pursuant to WSSC's motion, the District Court dismissed the action for failure to state a claim under count one for *Discrimination* and for lack of subject matter jurisdiction under the second count for *Abuse of Discretion*. Count one alleged Hardy was obviously a favorably treated front not meeting WSSC's definition of "minority-owned firm" due to lack of minority control. With studied ignorance of this allegation United States District Court Judge Frederic Smalkin decided on the pleadings first that Hardy was a "minority owned firm" hence "WSSC's choice between two *minority* enterprises involves no hint of prohibited, invidious discrimination." Even if Hardy was a front or puppet controlled and propped up by white firms, however, the District Court decided "allegations that the Hardy firm is not *bona fide*...[presented] no question of prohibited racial discrimination..." Despite specific allegations of favoritism shown toward the white controlled firm, the District Court found "the first count is so frivolous that it fails to present a substantial federal question at all." The first count was dismissed for failure to state a federal claim.

The second count for *Abuse of Discretion* would still survive under federal diversity jurisdiction. Petitioner alleged "this controversy exceeds $10,000 in value," "defendant's conduct...caused plaintiffs to incur the costs of administrative protest," and "plaintiff prays this Court grant plaintiff relief in awarding damages for the costs of plaintiff's administrative protest." Ignoring petitioner's allegation that "save for" WSSC's discrimination and abuse of discretion petitioner would have received the multi-million dollar contract, the District Court decided "the only monetary damages possibly recoverable under state law are the costs of plaintiff's administrative protest..." Without evidence or WSSC challenge, the District Court predicted "it is plain that, to a legal certainty, plaintiff could not recover $10,000 in monetary damages." In fact petitioner had incurred over $25,000 in administrative protest costs. Correction of this error was prevented by the District

Court's further findings that "it appears that plaintiff has indeed failed to exhaust the available administrative remedies," and that *Burford* abstention applied.

On appeal petitioner argued "fronting" and disparate bid treatment constituted racial discrimination; noted petitioner's recoverable administrative protest damages exceeded $25,000; and argued refiling the same protest was futile, WSSC protest procedures were inadequate, and that WSSC was estopped from arguing exhaustion by previously declaring its consideration of petitioner's protest "final" at the award meeting. WSSC, meanwhile, conceded abstention was improper.

On April 14, 1989 the Fourth Circuit Court of Appeals brusquely swept aside petitioner's claim that "fronting" and disparate bid treatment based on race were unconstitutional stating "we are unable to follow this argument." Not accepting the allegation Hardy was a white-controlled firm violating WSSC's own definition of a "minority owned firm", the Court of Appeals opined: "Both plaintiff Newman and Hardy are members of a minority race as contemplated under the pertinent set-aside statute." Without discrimination, the District Court's failure to see a federal claim was affirmed. The Court of Appeals also found that petitioner failed to exhaust its administrative remedies.

REASONS FOR GRANTING THE WRIT

A veritable dearth of law exists regarding the issue of "fronting" to obtain minority set-aside contracts. In rejecting defendant's motion for attorney's fees subsequent to dismissal, the District Court acknowledged that "there is no case law directly on point regarding claims of fronting in minority set aside plans." Despite this dearth, this Court has again and again subjected affirmative action plans to close examination to determine whether the employment of the plans was legitimate or not. Treating fronts as minorities does not withstand strict scrutiny analysis, however neither of the courts below questioned whether treating fronts as minorities was justified under a racially discriminatory affirmative action plan intended to benefit minorities.

The wickedness of fronting arises not only from the plain unfairness of being subject to different standards, but from the mockery of using remedial plans to minorities' detriment. In the first case of its kind, the District Court heralds nationwide the proposition that one can legally gut minority set-aside plans by setting up a front. This terribly wrong signal demands review.

ARGUMENT

1. THE COURTS' DECISIONS CLASH WITH *FULLILOVE v. KLUTZNICK,* 448 U.S. 448 (1980) AND *J.A. CROSON CO. v. CITY OF RICHMOND*, 109 S.CT. 706 (1989).

"Exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to §1983." *Patsy v. Board of Regents of State of Florida,* 457 U.S. 496, 516 (1982). Therefore if the Complaint states a claim for racial discrimination violative of petitioner's equal rights, exhaustion is not required and dismissal was error. Naturally,

> in appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In response to petitioner's claim that fronting constitutes racial discrimination violative of the equal protection clause of the Fourteenth Amendment, the District Court's published opinion states:

> Plaintiff disputes only the *bona fides* of the Hardy firm's minority status. That allegation utterly fails to state any claim of unlawful discrimination.

This pronouncement is implicitly contradicted by *Fullilove v. Klutznick,* 448 U.S. 448, 492 (1980) where former Chief Justice Burger found a minority set-aside plan passed muster and permissibly discriminated under the equal protection clause because:

> There is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not *bona fide* within the regulations and guidelines; for example, spurious minority-front entities can be exposed.

Apparently this Court was simply wasting ink, since the courts below found that exposure of spurious minority-front entities is unimportant; the atavistic attitude of the courts below was that WSSC simply violated a regulation. Plainly this Court intended once exposed, fronts would be disqualified; otherwise racial discrimination under an affirmative action plan becomes arbitrary and unjustified under the equal protection clause.

The dead letter of the WSSC regulation defining "minority owned firms" becomes irrelevant if in application white-controlled firms are treated to minority set-aside contracts. Discriminatory application of a facially neutral regulation is still discrimination violative of the equal protection clause. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886)(Discriminatory administration of a facially neutral law banning the operation of hand laundries in wooden buildings violates equal protection where administrative discretion resulted in exemptions being granted only to non-oriental launderers.); *Wyatt v. Security Inn Food & Beverage, Inc.* 819 F.2d 69 (4th Cir. 1987)(Discriminatory application of facially neutral "drinks only" policy only to black hotel lounge patrons constituted racial discrimination). Allowing one particularly wealthy and powerful white-controlled firm to bid on a minority only contract is the most arbitrary of applications of a discriminatory plan which fails under strict scrutiny examination.

Because minority set-aside plans are by definition discriminatory, courts are required to examine such plans under strict scrutiny to see their discriminatory purpose is fulfilled. *City of Richmond v. J.A. Croson Co.,* 109 S.Ct. 707 (1989). As Justice O'Connor stated:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated

> by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Id at 721. Neither the District Court nor the Court of Appeals applied strict scrutiny to determine whether WSSC's administration of its discriminatory minority set-aside plan was narrowly tailored to advance any policy important enough to advance the plan's inherent racial discrimination. Obviously, allowing a white-controlled firm to bid against minority controlled firms can not be so justified. But strict scrutiny was never applied here. Indeed, while petitioner spent the greater part of its oral argument on the applicability of strict scrutiny under this Court's opinion in *J.A. Croson,* the Court of Appeals failed to even cite *J.A. Croson* where this Court reversed this same Court of Appeals twice. By failing to examine WSSC's treatment of white-controlled firms as minority-owned firms under strict scrutiny, the courts below have clashed with the specific dictates of this Court warranting review and reversal.

2. THE COMPLAINT STATES A PRIMA FACIE CASE OF RACIAL DISCRIMINATION THROUGH POLICYMAKER'S FAVORITISM

Absent any fronting, the complaint states a separate claim for racial discrimination based on the allegations that WSSC favorably treated the white-controlled firm while mistreating petitioner. Wholesale waiving of contractual and legal requirements for the white controlled firm while holding the two minority controlled bidders to every regulatory minutiae is alone discriminatory. To disqualify petitioner as alleged for submitting one day late a permit the white controlled firm never even obtained smacks of the most arbitrary racial discrimination.

However, even such blatant discrimination is alleging too much. To establish a prima facie case of racial discrimination, petitioner need only allege (a) racial minority status; (b) application and qualification for the job; (c) rejection despite qualification for the job; and (d) that after rejection, the job remained open or

was given to a non-minority. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802; *Khalifa v. State*. 397 N.W.2d 383 (Minn.App. 1986)(Applying *McDonnell Douglas* prima facie test to failure of a minority firm to obtain a state minority set-aside contract) Likewise in the present case the complaint alleges (i) petitioner is a minority controlled business enterprise; (ii) petitioner sought and qualified for the contract; (iii) petitioner was denied the contract; and (iv) the contract was given to a white-controlled firm. WSSC's disparate treatment of petitioner creates at least a prima facie case of discrimination which should be tried on the merits.

3. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THIS COURT IN *COIT INDEPENDENT JOINT VENTURE v. FSLIC,* 109 S.CT. 1361 (1989).

Absent a federal question, federal diversity jurisdiction remains for petitioner's second count for abuse of discretion. Because petitioner had suffered over $10,000 damages in administrative protest costs at the time of filing the complaint and any defective jurisdictional allegations may be corrected under 28 U.S.C. §1653, only the issue of exhaustion of administrative remedies prevents continuance of this suit regardless of any discrimination claim.

The Court of Appeals held that petitioner had to re-exhaust its administrative remedies, in spite of petitioner's pleadings arguing inadequacy of re-protest and estoppel. Regarding the unaddressed issue of estoppel, as alleged in the complaint WSSC stated at the public award meeting that this was its final disposition of petitioner's protest. Only after petitioner relied on this recent pronouncement does WSSC argue refiling was necessary.

As for inadequacy of re-protest, all the facts in the complaint were alleged in petitioner's early protest filed well before 15 days after the award. WSSC evaluated this information once so resubmitting the protest is a meaningless delay of judicial review, particularly where WSSC has no commandment setting a deadline for responding to protests.

In *Coit Indep. Joint Venture v. FSLIC,* 109 S.Ct. 1361, 1375, (1989) Justice O'Connor states:

> Administrative remedies that are inadequate need not be exhausted. *Greene v. United States,* 376 U.S. 149, 163, 84 S.Ct. 615, 623, 11 L.Ed.2d. 576 (1964); *Smith v. Illinois Bell Telenhone Co.,* 270 U.S. 587, 591-592, 46 S.Ct. 408, 410, 70 L.Ed. 747 (1926)("public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief"). The lack of a reasonable time limit in the current administrative claims procedure renders it inadequate for several reasons. First, it allows FSLIC to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs. Second, it may enable the FSLIC to coerce claimants to enter into unfair settlements by virtue of the fact that the receiver's assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts.

Similarly here WSSC could delay review of the protest beyond the statute of limitations or spend its entire budget on Hardy the nonresponsive bidder long before judicial review. Had petitioner followed the meaningless quadrille of resubmission, WSSC protest procedure "would have denied plaintiff the right to protest." Complaint ¶27. Conflict with this Court's decision in *Coit Indep. Joint Venture v. FSLIC,* 109 S.Ct. 1361 (1989) calls for review if not vacation and remand of the decision of the Court of Appeals for the Fourth Circuit even in the absence of WSSC's unjust racial discrimination.

CONCLUSION

Because the courts below have decided as a matter of first impression that "fronting" for a minority set-aside contract is legal without examining the practice under strict scrutiny analysis mandated by this Court in *J.A. Croson, Co.*; because the discrimination through favorable disparate treatment of the white controlled firm was ignored though plead; and because the courts below did not address petitioner's inadequacy and estoppel arguments in finding administrative remedies were not exhausted, this Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND

GEORGE D. NEWMAN & SONS, INC.	)	
Plaintiff	)	Civil Action
v.	)	No. S-88-2439 v.
WASHINGTON SUBURBAN SANITARY COMMISSION,	)	
Defendant	)	

SECOND AMENDED COMPLAINT

George D. Newman and Sons, Inc., through undersigned counsel, amends and restates its complaint as of course pursuant to Fed.R.Civ.P. 15(a), duly marked according to Local Rule 41, and sues the defendant Washington Suburban Sanitary commission (hereinafter "WSSC" or "Commission" as the context requires) for awarding a sludge hauling contract to Hardy & Sons Trucking, Inc. (hereinafter "Hardy") an unqualified and non-responsive bidder who is believed to be fronting as a minority firm for Bio-Gro systems Incorporated (hereinafter "Bio-Gro") or Bevard Brothers, Inc. (hereinafter "Bevard"), or both, as set forth in the facts below.

Parties

1. Plaintiff is a Virginia corporation with principal offices at Route 2, Springs Road, Warrenton, Virginia 22186.

1.1 Defendant WSSC is a Maryland agency and municipal corporation with principal offices at 4101 Lloyd St., Hyattsville, Maryland, which has waived sovereign immunity under Art. 29,

Sec. 1-201 of the Maryland Code, and which, on information and belief, receives federal funding.

Jurisdiction & Venue

2. This Court has subject matter jurisdiction through 28 U.S.C. §1332 because this controversy exceeds $10,000 in value and is between citizens of differents states, and through 28 U.S.C. §1331 because this controversy arises under the laws and Constitution of the United States.

3. Venue properly lies in this district through 28 U.S.C. §1391(b) because Maryland is where all the defendants reside and where the claim arose.

Factual Allegations

4. On February 24, 1988 defendant WSSC issued an *Invitation for Bids* (IFB) seeking competitive bids by May 25, 1988 from minority-owned-and-controlled firms for a multi-million dollar contract, number 17224 (hereinafter the "Contract"), to haul sewage sludge from the Blue Plains Treatment Plant located in Washington, D.C., Exhibit A, *Invitation for Bids*.

5. Both plaintiff and, apparently, Hardy, submitted bids for said contract.

6. Contract price is not conclusive; on two occasions George D. Newman and Sons submitted the lowest bids on hauling contracts with the defendant WSSC but were not awarded the contract for lack of experience. In one instance George D. Newman and Sons, bid was 35% lower in price than the highest bidder who was awarded the contract by defendant WSSC. In the present case plaintiff's second lowest bid is 8% higher than Hardy's bid.

7. Minority status and responsiveness are conclusive; on a minority set-aside contract only responsive minority-owned-and-controlled firms may bid and contract. The defendant WSSC's minority procurement policy is designed to assist minority-owned-and-controlled firms by making available avenues to gain experience so as to be able to compete without special assistance.

8. Plaintiff, George D. Newman and Sons, Inc., is a legitimate minority business enterprise in Virginia certified by the State of Maryland Minority Business Enterprise Certification Council, 100% owned and controlled by minorities, and owner of its own trucks and hauling permits.

9. Hardy, on information and belief, is not a bona fide minority business enterprise. Rather, Hardy is a front controlled by Bio-Gro Systems Incorporated, a huge non-minority corporation, operating in more than half of the states of the United States, or Bevard Brothers, Inc., a corporation owned and controlled by a wealthy and politically powerful non-minority Maryland family and which is part of a joint venture with Bio-Gro Systems, purporting to subcontract for Hardy.

10. On a previous bid Mark Newman, Earl Frazier, and the late George D. Newman were parked in a van with smoked windows in the WSSC parking lot waiting to submit their bid. From their van they saw one of the Bevard brothers and John Hardy arrive separately in the WSSC parking lot. They observed, without being observed, the Bevard brother lay open a completed contract bid before John Hardy, Sr. on the hood of the car next to their van, and point to the places where Hardy was to sign. Hardy signed the bid without reading it. The Bevard brother then directed Hardy to take the bid into the WSSC and submit it as Hardy's own.

11. The defendant WSSC's general manager Richard Hocevar was informed of this incident.

12. On June 7, 1988, in accordance with WSSC procedure, plaintiff filed a formal protest alleging that Hardy was a front for Bevard, that Hardy's storage site was too small to meet the Contract requirements, that Hardy's site was not permitted, that Hardy was not qualified in Maryland, and that Hardy lacked financial responsibility and integrity. Exhibit C, plaintiff's formal protest.

13. With regard to fronting, Bevard, on information and belief, would supply Hardy with nearly all the trucks necessary to perform said contract. Hardy's officers were previously drivers for Bevard and the exhibits to the protest evidenced the fact that Bevard's trucks had been observed on Hardy's property. Exhibit D, Affidavit of Mr. James R. Wilkinson.

14. With regard to the size of the storage site, the Contract requires that "permitted storage facilities with a minimum capacity of 18,000 wet tons dedicated to Blue Plains Sludge shall be available during the full term of this Contract." Exhibit A, part two, page 8.

15. At the time of plaintiff's protest Hardy's apparent subcontractor, Bio-Gro, had not even begun construction of its storage facility. The facility eventually constructed is a 15,000 (not 18,000) wet ton facility, and as noted in the protest is subject to a King George County, Virginia zoning ordinance which forbids centralized storage facilities in King George County; once sludge is stored on a farm in King George County it can not be hauled off the farm and spread as fertilizer on other farms, but must be spread on the farm where the sludge storage facility is located. Exhibit E, King George County zoning ordinance, page 77, sec.4.6.2.3. Violation of the ordinance is a criminal act.

16. According to Virginia Water Control Board Resource Engineer John Law's calculations, Exhibit F, only 10,804 wet tons of sludge can be spread as fertilizer on the six fields of the farm where the storage facility is located.

17. Hardy's subcontractor's Virginia Water Control Board No Discharge Permit for the storage facility site allows spreading sludge as fertilizer only once every five years. Violation of the Water Control Board's order may lead to civil penalties up to $10,000 per day. Va. Code §62.1-44.32. So Hardy's storage facility is limited to being filled once with 10,804 wet tons over the four year duration of the Contract. That is, Hardy's capacity is far less than the 18,000 wet tons of continuously available capacity required by the Contract.

18. In subornation of a misdemeanor the defendant WSSC was later to conclude by recommending award to Hardy that the King George County ordinance was unenforceable. See next to last paragraph, Exhibit N, referenced at ¶31 below.

19. Concerning the failure to have a site permit, the Contract states "*The bidder must submit with his Bid, complete copies of all permits required for use in the performance of this Contract.*" Exhibit A, part two page 7 (emphasis in original). Plaintiff's protest noted

Hardy's submission did not include a Certificate to Operate a sludge facility as required by the Virginia Water Control Board. Hardy could not submit such a permit because its subcontractor had not even begun construction of the facility at the time of the bid submission.

20. In contrast, plaintiff did timely submit its Virginia water Control Board certificate to Operate the require 18,000 wet ton sludge storage facility.

21. Concerning Hardy's qualification, as stated in the protest at the time of the bid submission Hardy was not qualified to do business in the State of Maryland as is required of Maryland contractors by Title 7-203 of the Corporations and Associations Article of the Annotated Code of Maryland. Exhibit G, Maryland Certificate of Forfeiture for Hardy & Sons Trucking, Inc.

22. Concerning Hardy's lack of financial responsibility and integrity as required under the Contract, Exhibit A, part one, page 8, plaintiff's protest drew from Dunn and Bradstreet, police records, and other exhibits. The protest noted that Hardy, the alleged bidder on a multi-million dollar contract, had a Washington home with an assessed value of only $29,000. The protest further noted that Hardy's officers have long felonious criminal records (including rape, assaulting a police officer, multiple assaults, etc.). Exhibit H, Dunn and Bradstreet reports, and Exhibit I, criminal records of John A. Hardy.

23. Plaintiff's protest was sent to each Commissioner along with a request that award of the Contract be stayed to investigate plaintiff's allegations, since the present hauling contractor had indicated its willingness to continue hauling. Exhibit J, Letter to Commissioners dated June 7, 1988.

24. Plaintiff's protest was filed with defendant WSSC's purchasing agent according to WSSC rules "within fifteen calendar days after [plaintiff] knew of the facts giving rise to the protest." Exhibit A, part one, page 12.

25. Without responding to plaintiff's substantive allegations, the defendant WSSC's purchasing agent denied plaintiff relief with the cursory remark that the protest was untimely and stating

only an award maybe protested. Had plaintiff submitted its protest upon award, however, defendant, WSSC, could have contended protest was not "within 15 days". A vicious circle would have denied plaintiff the right to protest. Exhibit K, Letter from WSSC purchasing agent dated June 16, 1988.

26. On June 22, 1988, in accordance with WSSC procedure, plaintiff appealed the WSSC purchasing agent's decision to the Director of Maintenance and Operations. Exhibit L, Letter to Director.

27. On June 29, 1988, in spite of plaintiffs protest the staff of the defendant WSSC recommended the Commission approve award of the contract to Hardy at a public hearing. Plaintiff again vehemently protested before the commission. The defendant WSSC's minority business enterprise officer admitted no investigation whatsoever had been made of plaintiff's fronting allegations and the staff admitted failure even to ascertain whether Hardy was qualified, so the Commission directed further study.

28. On July 1, 1988 the Director of Maintenance and Operations stated that the WSSC had examined all plaintiff's objections and denied plaintiff's appeal in a final decision. Exhibit M, Letter from Director of Maintenance and Operations dated July 1, 1988.

29. On July 27, 1988 the Commission met in executive session, closed to the public, and considered a three page staff memorandum, Exhibit N, suggesting strict rejection of plaintiff's bid as being defective because of a late Maryland haul permit and suggesting accepting the Hardy bid despite its defects. On information and belief, a closed-door decision was made to accept the Hardy bid after perfunctory open consideration at the next meeting.

30. On August 17, 1988 the Commission, the final arbiter, met and the staff again recommended award to Hardy. At the outset the Commission announced an intention to make "final disposition" of the aforesaid protest of plaintiff.

31. At the public hearing by the defendant WSSC, plaintiff again protested that Hardy was a front for Bevard (Frank Bevard was "coincidentally" in the audience at the hearing—see ¶42

below), and that Hardy's bid was non-responsive for failure to have legally the required storage capacity, for failure to be qualified upon submission of the bid, and for failure to submit the required permits.

32. Plaintiff further pointed out that Hardy did not submit and still did not have either a Maryland hauling permit or the required Interstate Commerce Commission (ICC) permit to haul from D.C. to Maryland to Virginia. Transporting sludge across state lines without an ICC permit is a violation of federal law. 498 U.S.C. §10921. Exhibit O, Letter from Maryland Department of the Environment dated August 16, 1988, and Exhibit P, Affidavit of Clark S. Kall.

33. Incredibly, the only reason defendant WSSC found plaintiff's bid non-responsive was because plaintiff submitted its Maryland hauling permit late. Plaintiff did submit on time its ICC hauling permit and believed the ICC permit is all that is necessary since the Contract requirements are more stringent that the Maryland hauling permit requirements. The Maryland haul permit required by the WSSC is therefore nothing but a burden on interstate commerce usurping the ICC's federal supremacy.

34. Defendant WSSC's staff incorrectly argued to the Commission that Hardy did have a Maryland hauling permit (Contra Exhibit 0), that such a permit was not required as a submission with the bid (Contra Exhibit A, part two, page 7), and that an ICC permit was unnecessary (Contra Exhibit P).

35. As the hearing progressed, Commissioners Arrington and Bray began asking more and more questions of the WSSC staff concerning the possibility that Hardy was a front. The staff admitted again that no investigation had been done other than a phone call to the Maryland Department of Transportation to acknowledge that Hardy had once been certified a minority firm. the Commission sought refuge by conditioning award with an auditing requirement on Hardy. However, the WSSC staff testified that no financial audit of Hardy would reveal whether Hardy was actually in control.

36. When Hardy was asked for its hauling permits, it was discovered only Hardy's non-minority subcontractor, Bio-Gro Systems, held a non-transferable Maryland hauling permit.

37. Commission Arrington pointed out, and Commission Bray agreed, that since hardy did not have a permit to haul (i.e. Hardy was subcontracting hauling to a non-minority firm) and since Hardy did not have a permit to spread (i.e. Hardy was subcontracting spreading to a non-minority firm), Hardy did not have the power to do anything under the Contract and was in its subcontractors, control if no one.

38. As if to avoid further controversy at this point the defendant WSSC immediately voted to award the Contract to Hardy, four votes to two. Commissioners Arrington and Bray, the only black Commissioners, voted against making the award.

39. Plaintiff would and should have been awarded said Contract, save for defendant WSSC's discrimination in awarding the Contract to an obvious front and for defendant WSSC's abuse of discretion in illegally failing to address plaintiff's multifaceted protest.

40. The aforesaid vote was taken under the watchful eye of Frank Bevard, and, on information and belief, other members of the Bevard family. Mr. Bevard had no other apparent business before defendant WSSC, was present during the entire consideration of the Contract award, and conferred extensively with Hardy's counsel of record after the meeting. Exhibit Q.

41. Defendant, WSSC, has "looked only at the numbers" in considering award of the subject contract, ignoring its own contracting requirement of awarding only to minority controlled firms.

Legal Allegations

COUNT ONE

Racial Discrimination

42. Plaintiff realleges and incorporates by reference herein the allegations contained in the foregoing paragraphs as it set forth in full herein.

43. Defendant WSSC's actions in voting to award this minority set-aside Contract to Hardy which was obviously fronting for the non-minority allege subcontractors holding the permits and controlling Hardy, constitutes racial discrimination which subverts Maryland's minority procurement policy meant to help true minorities such as plaintiff gain experience and which violates plaintiff's civil rights under 42 U.S.C. §1983, 42 U.S.C. §2000d,and the Fourteenth Amendment of the Constitution.

COUNT TWO

Abuse of Discretion and Illegality

Plaintiff realleges and incorporates by reference herein the allegations contained in the foregoing paragraphs as if set forth in full herein.

45. Defendant WSSC's actions in failing to acknowledge plaintiff's valid substantive protest of Hardy's non-responsive, fraudulent bid; in ignoring the federal supremacy of the ICC by requiring a state hauling permit from plaintiff, an ICC permit holder; and in awarding the contract illegally to defendant Hardy, an unqualified bidder, constitutes an arbitrary, capricious and unreasonable abuse of discretion contrary to law.

Ad Damnum

46. Defendant's conduct has deprived plaintiff of the benefits of WSSC contract number 17224 and caused plaintiff to incur the costs of administrative protest and this action.

WHEREFORE, plaintiff prays this Court direct the defendant to reconsider its award of contract number 17224, to enjoin WSSC from entering into contract number 17224 with Hardy or, in the alternative, to order WSSC to terminate said contract, to order WSSC to cease its unlawful discrimination, and to order the WSSC to suspend Hardy and Bevard from further contracting with the WSSC for a reasonable period of time.

FURTHER, plaintiff prays this court grant plaintiff relief in awarding damages for the costs of plaintiff's administrative protest, the costs of this action including reasonable attorney's fees under 42 U.S.C. §1988, and punitive damages against the defendant of $100,000.

FINALLY, plaintiff prays this Court grant plaintiff all such other relief the Court may find appropriate.

Respectfully submitted,

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Alexandria, VA 22314
(703)-838-0000

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2637

GEORGE D. NEWMAN
& SONS, INC., Plaintiff-Appellant,

v.

WASHINGTON SUBURBAN
SANITARY COMMISSION, Defendant-Appellee,

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CA-88-2439)

Argued: March 6, 1989 Decided: April 14, 1989

Before RUSSELL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Clark S. Kall (Mark Rollinson, Smith Rollinson on brief) for Appellant. Robert H. Drummer (Nathan J. Greenbaum, Vicki E. Webb, Washington Suburban Sanitary Commission on brief) for Appellee.

PER CURIAM:

This suit seeks to invalidate an award to the lowest bidder of a contract by the Washington Suburban Sanitary Commission ("WSSC"), a public agency created under the laws of Maryland and award such contract to the next lowest bidder. The controversy, though one against WSSC is in reality between two enterprises, both of which have been certified as minority enterprises by agencies of the State of Maryland. The enterprises competed, along with others, in the award by WSSC of a contract under a voluntary minority set-aside program adopted by WSSC. Newman, the plaintiff, contends that Hardy, the low bidder, though certified by an appropriate State agency as a minority enterprise qualified to bid under the set-aside regulations, was not a *bona fide* minority enterprise. The plaintiff alleges in his complaint that he objected to Hardy's participation in the bidding before the bids were filed, but was advised by the purchasing agent of WSSC that he should not file his objection until the bids were opened and the award was made. Newman was advised at that point he could, within fifteen days after the award, file his objections to Hardy and that he could then receive an administrative hearing, with all the processes attaching thereto on his objections. Newman, however, did not file any objections to the award of the contract to Hardy within the fifteen days provided for the filing of such objections. After the fifteen days had expired, Newman filed this action in the District Court.

Newman would construe his action as a civil rights action complaining of racial discrimination. It is his contention that under the WSSC regulations, a minority enterprise entitled to participate in the award of contracts under the set-aside regulations of WSSC must be at least 51% owned and controlled by a member of one or more of the groups defined by WSSC as minorities. He asserts WSSC had an obligation to make an independent determination whether Hardy actually was a "minority enterprise" before awarding a contract under the set-aside program, and that WSSC had not made such a determination. This failure constituted, under Newman's theory as stated in his complaint, a violation of his constitutional rights. The contention is obviously without merit

and the District Court properly dismissed the action and we affirm, though for reasons somewhat different than those assigned by the District Court.

This is not a civil rights case; it is simply a complaint that award of a public contract under an agency regulation was violative of such regulations. The agency and the State statute provide the plaintiff with an administrative remedy, with the full panoply of due process rights, to redress any such alleged violations of this regulation. Newman failed to comply with the procedure provided under State law and agency regulations for redress of his complaint. Newman would excuse his failure to pursue his administrative remedies by arguing that this case represents a constitutional claim to remedy a racial discrimiantion [sic] suffered by the plaintiff and, as such, is not within the requirement of exhaustion of administrative remedies. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 516 (1982); *Educational Services, Inc. v. Maryland State Board for Higher Education*, 710 F. 2d 170, 173, fn.8 (4th Cir. 1983). We are unable to follow this argument.

This is not a case of racial discrimination. Both the plaintiff Newman and Hardy are members of a minority race as contemplated under the pertinent set-aside regulation. Both relied on a State set-aside regulation issued under State law in making their bids. The constitutional validity of the regulation is not contested. To qualify under the regulation, awards under the set-aside order are to be made only to persons qualifying thereunder. The question in this case is whether Hardy qualified under the regulation. The question involves simply an application of a regulation adopted by the agency. The plaintiff was advised expressly, by his own allegation. [sic] that, if he had any objections to a bid by a party certified as a minority enterprise under the set-aside program, he should file his objections after the award and he would be accorded a due process hearing, first, before the agency and then by appeal. This was the procedure marked out by the regulation. The plaintiff failed to object after the award within the time fixed in the regulation. His belated suit filed after he had failed to contest the award within the time fixed by the regulation bars this suit which rests on an alleged violation of a valid state regulation and not on any

federal constitutional violation. Actually, federal jurisdiction of this suit at all is questionable.

The judgment of the District Court is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GEORGE D. NEWMAN & SONS, INC.	:	
v.	:	CIVIL NO. S 88-2439
WASHINGTON SUBURBAN SANITARY COMMISSION	:	

MEMORANDUM

This matter is before the Court on the motion of defendant to dismiss the amended complaint. Plaintiff is a disappointed bidder under a contract to haul sludge from the Blue Plains Sewage Treatment Plant operated by defendant. The plaintiff firm was the second lowest of three bidders, the contract having been awarded to Hardy & Son Trucking, Inc. The essence of plaintiff's case is that, although both plaintiff and the Hardy firm are certified as minority business enterprises, the Hardy firm is not a *bona fide* minority business firm.

The first count of the complaint rests on the civil rights and federal question jurisdiction of the Court, 28 U.S.C. sections 1331, 1343, and 1983 (1982). Plaintiff claims that it was racially discriminatory for defendant to award the contract to "Hardy which was obviously fronting for the non-minority alleged subcontractors holding the permits and controlling Hardy . . . ." Second Amended Complaint para. 44. Plaintiff does not dispute the fact that Hardy is qualified under Maryland law as a minority job enterprise, *viz.*, a black owned and operated business. Plaintiff disputes only the *bona fides* of the Hardy firm's minority status. That allegation utterly fails to state any claim of unlawful discrimination.

Unlawful discrimination is an act towards, or a choice between, persons based in whole or in part upon a motive to treat certain persons, in this case, racial minorities, differently from

others. It is impossible to see how defendant WSSC could be guilty of any prohibited racial discrimination when both plaintiff and the successful bidder were qualified as minority business enterprises. That is, WSSC's choice between two *minority* enterprises involves no hint of prohibited, invidious discrimination. Thus, the case of *Khalifa v. State,* 397 N.W.2d 383 (Minn. App. 1986), on which plaintiff relies in its opposition, is inapposite. *Khalifa* concerned a state contract designated for a minority set-aside program. After non-minority would-be bidders launched a telephone campaign, the contract was removed from the set-aside program and awarded, through competitive bidding, to a non-minority bidder. *Id.* at 385-86 Here, on the other hand, WSSC need not have sought minority bidders at all. *See* WSSC Minority Procurement Policy (submitted as part of Exhibit A to Complaint) (listing numerous methods for encouraging minority participation in contracts). More importantly, in the eyes of WSSC, based upon certifications issued by other Maryland agencies, both Hardy and plaintiff *were* minority contractors. Perhaps the wisdom of the choice, or its "correctness" is called into question by plaintiff's allegations that the Hardy firm is not *bona fide,* but no question of prohibited racial discrimination, or other violation of federal civil rights, is presented.

Moreover, a disappointed bidder has no fourteenth amendment property interest in a government contract unless state law declares that such a right exists. *See Curtis Ambulance of Florida Inc. v. Board of County Commissioners,* 811 F.2d 1371, 1375 (10th Cir. 1987); *Kendrick v. City Council of Augusta,* 516 F. Supp. 1134, 1138 (S.D. Ga. 1981). *See also Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). As defendant points out, plaintiff has cited no Maryland case or statute conferring such a right. Thus, plaintiff's first count fails to state any federal claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), and it must be dismissed.

In addition, the first count is so frivolous that it fails to present a substantial federal question at all. Therefore, this Court lacks subject matter jurisdiction as to the first count. *See Davis v. Pak,* ___ F.2d ___, No. 88-3039 (4th Cir. Sept. 13, 1988). As the Fourth Circuit recently stressed, "[i]t is axiomatic that the federal courts are courts of limited jurisdiction"; courts must "guard against the

litigant who frames a pretextual federal issue solely for the purpose of having a state law claim adjudicated in the federal system." *Id.*, slip op. at 5, 8.

Given the lack of any merit or substance in plaintiff's first claim, the second claim cannot properly rest on pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) ("federal claim must have substance sufficient to confer subject matter jurisdiction on the court"); *Davis*, No. 88-3039, slip op. at 8 ("If the federal claim is found insubstantial, . . . the court is also without jurisdiction to decide any state issues or claims . . . ."). Although plaintiff alleges diversity jurisdiction under 28 U.S.C. section 1332 (1982), it is plain that, to a legal certainty, plaintiff could not recover $10,000 in monetary damages, exclusive of interest and costs. Plaintiff's state law claim is an ill-defined one for "abuse of discrimination [sic] and illegality." The only monetary damages possibly recoverable under state law are the costs of plaintiff's administrative protest, the costs of this action, and punitive damages. Assuming that the costs of the administrative protest are recoverable, it appears to the Court to a legal certainty that less than $10,000 would be involved. Of course, under section 1332, the costs of the present action are not includible in the jurisdictional amount calculus. 28 U.S.C. section 1332(b) (1982). Finally, under Maryland law, any claim for punitive damages in these circumstances is patently frivolous. *See Katz v. Washington Suburban Sanitary Commission*, 284 Md. 503, 507-09, 397 A.2d 1027, 1030-31 (1979) (WSSC is a state agency entitled to sovereign immunity); Md. State Gov't Code Ann. sections 12-104, 12-201 (1984 & Supp. 1987) (no waiver of sovereign immunity for punitive damages in tort or contract actions, respectively).

Viewing the jurisdictional amount question as if only injunctive relief were sought, and measuring the value of the objective which plaintiff seeks to achieve from plaintiff's standpoint, *see Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 347 (1977), it is likewise apparent that the jurisdictional amount is not satisfied. At the August 19, 1988 hearing before Judge Ramsey on the temporary restraining order, plaintiff made it plain that it was claiming no entitlement to the award of the contract in question, but simply was seeking a rebid. Transcript of

August 19, 1988 Hearing, at 13-14. Any benefit to plaintiff from a rebid is far too speculative to satisfy the jurisdictional amount, given that it was not the low bidder on the job, given that Hardy might again be awarded the contract, and given that other bidders might come in.

In fact, WSSC documents provided by plaintiff reveal that the bids of both plaintiff and a third bidder, MTI Construction Company, were "fiscally unacceptable." In addition, plaintiff failed to submit a necessary haul permit by the deadline for bid clarifications. The WSSC staff therefore recommended that if the contract did not go to Hardy,

> [t]he contract should . . . be rebid on the open market and should include a mandatory minority subcontracting requirement of 30-40%, with the WSSC of course reserving the right under its Minority Procurement Policy of awarding the contract to a minority prime contractor who submits a bid within 10% of the low bid.

Deposition of John A. Hardy, Sr., Exhibit 1, at 3 (submitted as Exhibit A to plaintiff's Amended Motion for Preliminary Injunction). Thus, even if Hardy had not been awarded the contract, WSSC would not have given the job to plaintiff. More importantly, even if Hardy were stripped of its minority contractor status, Hardy would still be eligible to bid if the contract were offered to all bidders.

Plaintiff's attempt to satisfy the jurisdictional amount by suggesting, in its opposition to this motion, that the Court might order the contract awarded directly to plaintiff is based upon cases applying federal law, rather than upon the law of Maryland. Plaintiff has pointed to nothing under Maryland law that would entitle it to an award of the contract or to anything other than another chance to bid, which certainly cannot be said to be worth $10,000.

Even persuasive federal case law has declared it inappropriate for a court to award a government contract directly to an unsuccessful bidder. The Circuit Court of Appeals for the District of Columbia, noted for its expertise in reviewing administrative decisions, stressed the discretion due an agency's decision concerning the awarding of government contracts in

Delta Data Systems Corp. v. Webster, 744 F.2d 197 (D.C. Cir. 1984) (Scalia, J.). An unsuccessful bidder on an FBI procurement contract challenged the inclusion of certain corporate financial data in the calculations used to rank bidders. The district court ordered the FBI to award the contract to plaintiff, and the FBI appealed. In reversing the lower court's order, then-Judge Scalia declared that because of the deference due an agency's decision, "a court may not order the award of a contract unless it is clear that, but for the illegal behavior of the agency, the contract would have been awarded to the party asking the court to order the award." *Id.* at 204. *See also Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 869 (D.C. Cir. 1970) ("It is indisputable that the ultimate grant of a contract must be left to the discretion of a government agency; the courts will not make contracts for the parties."). Because it was not clear that Delta Data would have received the contract but for the FBI's allegedly improper actions, the district court exceeded its discretion in awarding the contract to Delta Data. *Delta Data,* 744 F.2d at 206. The facts here indicate that even if Hardy had not won the contract, plaintiff would not have been awarded the job. Therefore, it would be improper for this Court to consider awarding the contract directly to plaintiff.

Thus, as Judge Ramsey noted at the August 19 hearing, "if the Plaintiff wins all the way, the best that will happen in this case is a rebidding of the contract. It will not be a letting of the contract to the Plaintiff, nor is there any real likelihood of an awarding of damages. . . ." Transcript of August 19, 1988 Hearing, at 33-34. In *Delta Data*, Judge Scalia stressed the speculative value of a rebid:

> If the vindication of "rights" belonging to Delta Data were the principal object, the ideal remedy would give Delta Data its "expectation" damages – that is, place it in the economic situation it would have occupied if the FBI had not acted improperly. The problem is that we have no way of knowing what that economic situation would have been. All we know for sure is that Delta Data was deprived of an *opportunity* to obtain an award; it might not have received the award even if the FBI had acted properly.

Delta Data, 744 F.2d at 206 (emphasis in original). *See also Old Dominion Dairy Products, Inc. v. Secretary of Defense,* 631 F.2d 953 (D.C. Cir. 1980) (finding no grounds to vacate federal agency's award of contract because it was speculative whether unsuccessful bidder would have received contract); *John C. Holland Enterprises, Inc. v. J. P. Mascaro & Sons, Inc.,* 653 F. Supp. 1242 (E.D. Va.), *aff'd,* 829 F.2d 1120 (4th Cir. 1987) (diversity action in which unsuccessful bidder failed to state claim against successful bidder for state tort of unjust enrichment due to speculative nature of claim). When it is so speculative that plaintiff would have received the contract, the potential value of the contract cannot be considered in determining whether plaintiff's claim meets the jurisdictional amount.

Because the Court finds that it lacks both federal question and diversity jurisdiction over this action, it is not necessary to reach either the issue of exhaustion of administrative remedies or that of federal abstention. Nevertheless, the Court notes that it appears that plaintiff has indeed failed to exhaust the available administrative remedies. WSSC regulations provide: "Any protest concerning the *solicitation* or the Contract *award,* and any dispute concerning *performance* under this Contract . . . . shall be filed within 15 calendar days after the protestor knows or should have known of the facts giving rise thereto." WSSC General Conditions and Instructions for Bidders or Offerors, at 12 (attached to Complaint as Exhibit A) (emphasis added). There is no provision for protesting a *bid,* as plaintiff attempted to do. A court lacks jurisdiction if the plaintiff has not yet exhausted administrative remedies. *Prince George's County v. Blumberg,* 288 Md. 275, 283-84, 418 A.2d 1155, 1160-61 (1980), *cert. denied,* 449 U.S. 1083 (1981); 17 C. Wright, A. Miller & C. Cooper, *Federal Practice and Procedure* section 4233, at 586 (1988).

Furthermore, even if the Court had jurisdiction, it would be proper, given the circumstances of this action, for the Court to abstain from hearing this case. In the seminal case of *Burford v. Sun Oil Co.,* 319 U.S. 315 (1945), the Supreme Court determined that abstention is appropriate when federal intervention might threaten important state policies or regulatory schemes. As the Fourth Circuit has explained: "The purpose of *Burford* abstention

is to prevent a federal court from interfering with a 'complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determinations subject to expeditious and adequate judicial review are afforded.'" *Browning-Ferris, Inc. v. Baltimore County,* 774 F.2d 77, 79 (4th Cir. 1985) (quoting *Aluminum Company of America v. Utilities Commission of North Carolina*, 713 F.2d 1024, 1029 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984)). Here the contract in question concerns the hauling, storage, and disposal of sewage sludge, which is governed by a comprehensive statutory and regulatory scheme reflecting Maryland environmental and land use policies. *Id. See* Md. Envtl. Code Ann. sections 9-230 to -249 (1987). Thus, just as the Fourth Circuit in *Browning-Ferris* determined that it was appropriate for a federal district court to abstain from hearing a suit concerning a Maryland landfill contract, *Browning-Ferris,* 774 F.2d at 79-80, so it would be appropriate, if this Court had jurisdiction, to abstain from hearing this suit involving a sludge-hauling contract governed by the same state statutory scheme.

In short, the amended complaint does not present a federal case, either under the federal question jurisdiction or the diversity jurisdiction of the Court. Therefore, an order will be entered separately, dismissing count one of the complaint for failure to state a claim upon which relief can be granted, and dismissing count two for lack of federal subject matter jurisdiction.

/s/
Frederic N. Smalkin
United States District Judge
Dated: October 3rd, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

GEORGE D. NEWMAN & SONS, INC.	:	
v.	:	CIVIL NO. S 88-2439
WASHINGTON SUBURBAN SANITARY COMMISSION	:	

ORDER

For the reasons stated in the foregoing Memorandum, IT IS, this 3rd day of October, 1988, by the Court, ORDERED:

1. That count one of the amended complaint BE, and the same hereby IS, DISMISSED for failure to state a claim upon which relief can be granted;

2. That count two of the amended complaint BE, and the same hereby lS, DISMISSED for lack of federal subject matter jurisdiction;

3. That this case BE, CLOSED; and

4. That the Clerk of Court mail copies of the foregoing memorandum and of this Order to counsel for the parties.

/s/
Frederic N. Smalkin
United States District Judge

Supreme Court, U.S.
FILED
SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE D. NEWMAN & SONS, INC.
Petitioner,

VERSUS

WASHINGTON SUBURBAN SANITARY COMMISSION
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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49pp

QUESTIONS PRESENTED

1. Whether the refusal of the WSSC to disqualify the low bidder, certified by an independent State agency as a black owned business, from the award of a contract under a voluntary minority business enterprise program based upon the claim of a disappointed higher bidder, also certified as a black owned business, that the low bidder was in reality under the control of non-minority owned businesses constitutes race discrimination against the disappointed bidder?

2. Whether the Fourth Circuit was correct in affirming the decision of the District Court that the failure of Newman to exhaust its administrative remedies by filing a protest of the award under WSSC regulations deprived the Court of subject matter jurisdiction over Count II under Maryland law?

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WSSC Minority Business Enterprise Policy. Exhibit A, Amended Complaint . . A7

Letter of June 7, 1988 to Sally Barkley. Exhibit C, Amended Complaint A15

Staff Memorandum: Proposed Contract No. 17224, Disposal of Blue Plains Sludge. Exhibit L, Amended Complaint . . A22

Letter of June 16, 1988 to Mark Rollinson returning protest package. Exhibit K, Amended Complaint. A26

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No. 89-202

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

GEORGE D. NEWMAN & SONS, INC.

Petitioner,

VERSUS

WASHINGTON SUBURBAN SANITARY COMMISSION

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The Respondent, Washington Suburban Sanitary Commission, respectfully requests that this Court deny the Petition for Writ of Certiorari.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 42 §1983.

United States Code, Title 42 §2000(d).

Washington Suburban Sanitary Commission Minority Business Enterprise Policy.

STATEMENT OF THE CASE

A. FACTS ALLEGED

The facts, as alleged by the Petitioner in the Amended Complaint and the attachments thereto, are as follows:

The Washington Suburban Sanitary Commission (hereinafter WSSC) is an agency of the State of Maryland responsible for providing water and sewer service within Prince George's and Montgomery Counties in Maryland. The WSSC issued an Invitation for Bids (hereinafter IFB) on Contract No. 17224 (hereinafter Contract) on February 24, 1988. (A1). The Contract is for the hauling, storage, and disposal of approximately 400 wet tons per day of undigested, lime-amended sewage sludge produced at the Blue Plains Wastewater Treatment Plant in the District of Columbia. (A4, A22). The WSSC expressly reserved the right to reject all bids and advertise for new bids. (A3).

The IFB restricted bidding on this Contract to certified minority business enterprises (hereinafter MBE) pursuant to the WSSC MBE Policy. (A6). The WSSC MBE Policy is a voluntary affirmative action plan adopted by the WSSC designed to increase the participation of MBEs in procurement contracts awarded by the WSSC. (A7). The purchasing agent has a variety of options under the WSSC MBE Policy, including restricting bidding on specific

contracts to MBEs. The WSSC does not certify firms as MBEs. Rather, the WSSC requires a firm to be certified as an MBE by other independent government agencies, such as the Maryland Department of Transportation and the Maryland Minority Business Enterprise Certification Council. An MBE awarded a contract under the WSSC MBE Policy is prohibited from subcontracting more than forty percent of the Contract to non-minority owned businesses. (A11).

The WSSC received three bids for the Contract from certified MBEs. A low bid was submitted by Hardy and Son Trucking, Inc. (hereinafter Hardy), an MBE certified as such by the Maryland Department of Transportation. (A19, A23-24). The Petitioner, Newman, submitted a bid with an estimated price of six hundred fifty-three thousand seven hundred thirty dollars ($653,730) more than Hardy's prompt payment price. (A24). Newman is certified as an MBE by the Maryland Minority Business Enterprise Certification Council. (Pet. Apx. 3a).

After the bid opening, but prior to the award, Newman filed a letter dated June 7, 1988 with the purchasing agent protesting Hardy's bid. Newman claimed that Hardy's bid was not responsive for a variety of reasons, including an assertion upon information and belief that Hardy was controlled by non-minority businesses. (A15). Newman was informed by letter dated June 16, 1988 that WSSC regulations do not permit a protest of a bid. The letter also advised Newman that the protest could be resubmitted after the award. (A26).

Newman sent a letter dated June 22, 1988 to the Director of Maintenance and Operations seeking a review of their protest of Hardy's bid. (A27). Once again, Newman was informed by letter dated July 1, 1988 that WSSC regulations authorize protests of either the solicitation or the award of a contract, but not of a bid. Newman was expressly told that they could resubmit the protest within fifteen days after the award if they still felt it was valid. (A29).

The Contract was considered at the June 29, 1988 and the August 17, 1988 public meetings of the WSSC. Counsel for Newman was permitted to set forth Newman's position at both public meetings. The Contract was awarded to the low bidder, Hardy, at the August 17, 1988 public meeting of the Commission. (A29-30). Newman never resubmitted its protest after the award of the Contract. (Pet. Apx. 5a-6a)

B. THE LITIGATION.

Newman filed a Complaint along with a Motion for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Maryland on August 18, 1988. The Complaint claimed in Count I that the award of the contract to Hardy constituted discrimination on the basis of race in violation of 42 U.S.C. §1983 and 42 U.S.C. §2000(d) because Hardy, although a certified MBE, was in reality under the control of two businesses owned by persons who are not minorities as defined under the WSSC MBE Policy. Count II of the Complaint attempted to set forth a cause of action

for abuse of discretion in awarding the Contract under Maryland law.

After a hearing held on August 18, 1988, United States District Judge Norman F. Ramsey issued an oral opinion and order denying Newman's Motion for a Temporary Restraining Order. Counsel for Newman conceded at the hearing that the court lacked the authority to order award of the Contract to Newman and subsequently amended the Complaint to delete Newman's prayer for such relief on August 25, 1988.

The WSSC filed a Motion to Dismiss the Amended Complaint on September 9, 1988. On October 3, 1988, United States District Court Judge Frederic N. Smalkin issued a Memorandum and Order granting the Motion to Dismiss the Amended Complaint. Judge Smalkin held that Count I failed to state a claim upon which relief can be granted and was so frivolous that it failed to present a federal question at all. Count II was dismissed due to lack of subject matter jurisdiction and in the alternative that the exercise of federal abstention was appropriate.

Newman filed an appeal to the United States Court of Appeals for the Fourth Circuit on October 5, 1988. The decision of the District Court was affirmed in a *per curiam* opinion dated April 14, 1989 by the United States Court of Appeals for the Fourth Circuit. Newman's request for rehearing *en banc* was denied on June 5, 1989.

REASONS WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

The only federal question raised in the Petition is "whether treating minority fronts as minorities was justified under a racially discriminatory affirmative action plan intended to benefit minorities." (Petition 8.) Neither the District Court nor the Fourth Circuit needed to address this issue since it was not raised in the Amended Complaint.

This case involved a challenge by the second low bidder to an award of a contract to the low bidder. Both the low bidder and the Petitioner are MBEs certified as such by independent State agencies. The facts set forth in the Amended Complaint raised the question of whether the regulations adopted by the WSSC in implementing the MBE Policy were followed in the award of this Contract.

The WSSC accepted Hardy's bid because Hardy is certified as an MBE by the Maryland Department of Transportation and it was the low bid. Newman claimed that the WSSC should have rejected the Hardy bid as non-responsive since Hardy was a minority front controlled by a white owned company. It is the refusal of the WSSC to look behind the certification of the Maryland Department of Transportation that forms the basis of the Amended Complaint. Whether or not the WSSC should have done this is a question of State law unique to the regulatory scheme adopted by the WSSC

to govern the award of its procurement contracts. Both the District Court and the Fourth Circuit concluded that there was no reason to decide this issue on its merits since it did not raise a federal question sufficient to confer federal jurisdiction.

The Petitioner's argument that the decision of the Fourth Circuit clashes with the decisions of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *J. A. Croson Company v. City of Richmond*, 109 S.Ct. 706 (1989),[1] is without merit.[2] The Amended Complaint did not attack the legality of the MBE Policy adopted by the WSSC under the Fourteenth Amendment Equal Protection Clause. Such a direct attack would have been futile since it is the viability of that voluntary affirmative action plan that supports the Petitioner's claim that it should have been awarded the Contract in dispute. Both *Fullilove* and *Croson* involved a direct challenge to a voluntary affirmative action plan brought by non-minorities that were denied the preferential treatment afforded to minorities under the plan. Newman was not denied the right to compete under the WSSC MBE Policy as a minority.

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[1] .The Petitioner's failure to understand the decision of this Court in Croson is highlighted by the incorrect assertion that the decision of the Fourth Circuit was reversed twice by this Court.

[2]Judge Sprouse who participated in both *Croson* decisions was a member of the Fourth Circuit panel that heard and decided the instant case.

The Petitioner's belated attempt to portray the Amended Complaint as establishing a *prima facie* case of racial discrimination pursuant to *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), ignores a crucial fact. Under both *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a plaintiff must show that he or she is at least as qualified as the non-minority selected. In the competitive bidding arena, selections among qualified bidders are made on the basis of price. Newman never alleged that it put in a bid to perform the sludge hauling for the lowest price. In fact, the Amended Complaint concedes that the award went to the lowest bidder.

II. THE FACTS OF THIS CASE ARE PECULIAR AND ARE NOT LIKELY TO RECUR

The Fourth Circuit concluded that Newman had an administrative remedy under State law that included the full panoply of due process rights, but failed to avail itself of this right. The Amended Complaint and the attachments thereto made it clear that Newman's protest was filed prematurely and that it never filed a timely protest as required under State law. In fact, the WSSC expressly informed Newman that its protest was prematurely filed and advised Newman as to the proper time to file the protest. Newman's refusal to heed this advice led the District Court and the Fourth Circuit to conclude that there was no jurisdiction to hear the present suit.

The Petitioner's reliance on the recent decision of this Court in *Coit Independent Joint Venture v. FSLIC*, 109 S.Ct. 1361 (1989), as a reason for this Court to review this case is also misplaced. While the sufficiency of an administrative remedy created by a federal statute applicable nationwide is surely of sufficient importance to merit review by this Court, the protest procedure established by WSSC procurement regulations is quite a different situation. This protest procedure applies to only some of the contracts awarded by the WSSC. It is important only to those companies that bid on such contracts and would be of no broad public importance.

This case is simply a dispute under State law over the award of a State contract. The lack of a decision on the merits below was a direct result of the Petitioner's failure to perfect an appeal under State law.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

NATHAN J. GREENBAUM*
GENERAL COUNSEL
ROBERT H. DRUMMER
ASSOCIATE COUNSEL

Washington Suburban
Sanitary Commission
4017 Hamilton Street
Hyattsville, MD 20781
(301) 699-4727

Counsel of Record for Respondent

APPENDIX

APPENDIX

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IFB for Contract No. 17224, Cover letter. Exhibit A, Amended Complaint. A1

Extract from General Conditions and Instructions for Bidders or Offerors. ¶13. Right to Accept or Reject Bids. Exhibit A, Amended Complaint. A3

Extract from General Conditions and Instructions for Bidders or Offerors. ¶1. Project Scope. Exhibit A, Amended Complaint. A4

Extract from General Conditions and Instructions for Bidders or Offerors. ¶27. Basis for Award. Exhibit A, Amended Complaint. A6

WSSC MINORITY BUSINESS ENTERPRISE POLICY. Exhibit A, Amended Complaint . A7

Letter of June 7, 1988 to Sally Barkley. Exhibit C, Amended Complaint A15

Staff Memorandum: Proposed Contract 17224 Disposal of Blue Plains Sludge. Exhibit L, Amended Complaint . A22

Letter of June 16, 1988 to Mark Rollinson returning protest package. Exhibit K, Amended Complaint A26

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Letter of June 22, 1988 to
Cortez A. White, Director
of Maintenance and Operations.
Exhibit L, Amended Complaint . A27

Letter of July 1, 1988 to Mark
Rollinson from Cortez A. White.
Exhibit M, Amended Complaint. A29

IFB for Contract No. 17224, Cover letter Exhibit A, Amended Complaint.

February 24, 1988

Re: IFB for Contract No. 17224

To All Interested Bidders:

Sealed Bids are hereby invited, addressed to the Purchasing Office, Washington Suburban Sanitary Commission, for

CONTRACT NO. 17224

as described in this Invitation for Bids. The Bids will be received in the Purchasing Office of the Washington Suburban Sanitary Commission, Warehousing Building, Second Floor, 4101 Lloyd Street, Hyattsville, Maryland, 20781 until

WEDNESDAY, MAY 25, 1988 AT 2:30 P.M.

at which time and place they will be publicly opened and read.

All Bids must be submitted with one original and two copies upon the attached forms, must give the price in figures for the proposed purchase, and must be signed by the Bidder with his name and address. Each Bid must be enclosed in a sealed envelope and have written on the face of the envelope:

CONTRACT NO. 17224 FOR BLUE PLAINS SLUDGE HAULING AND/OR HAULING AND DISPOSAL

FAILURE OF A BIDDER TO SUBMIT ONE ORIGINAL AND TWO COPIES OF HIS BID MAY RENDER THE BID NONRESPONSIVE AND THE BID MAY NOT BE CONSIDERED FOR AWARD.

If forwarded by mail, the sealed envelope containing the Bid, marked as directed above, must be enclosed in another envelope addressed as specified in this document and sent, preferably, by registered mail. This Invitation for Bids is prepared in two parts: Part One contains General Provisions. Part Two contains all forms which the Bidder must complete, such as affidavits, bonds, and price submissions. Part One should be retained by the Bidder. A copy of Part Two should be retained by the Bidder and the original of Part Two forwarded to the Washington Suburban Sanitary Commission as indicated above.

Sincerely,

By: Paul A. Turack
Contracts Supervisor

PAT/map

Extract from General Conditions and Instructions for Bidders or Offerors, 13. Right to Accept or Reject Bids, Exhibit A, Amended Complaint.

13. RIGHT TO ACCEPT OR REJECT BIDS: The Commission hereby reserves the right to accept or reject all or part of any or all Bids, item by item, and to advertise for new Bids, as the interests of the Commission may require. (Part One, pg. 8 of 23)

Extract from General Conditions and Instructions for Bidders or Offerors, 1. Project Scope, Exhibit A, Amended Complaint.

1. PROJECT SCOPE: This contract covers the hauling and/or hauling, storage and disposal of varying quantities of municipal sludge from the District of Columbia's Blue Plains Wastewater Treatment Plant (WWTP). Sludge shall be delivered to the Washington Suburban Sanitary Commission's (Commission) Montgomery County Composting Facility (MCCF), Montgomery Industrial Park, 2201 Industrial Parkway, Silver Spring, Maryland 20904, and/or delivered and applied at Contractor-provided land disposal sites and/or storage at facilities outside of Prince George's County, Maryland. The sludge to be hauled and/or hauled, stored, and disposed of is undigested sludge which is lime-amended only to the extent necessary for the dewatering process.

The Contractor shall do any and all work and furnish all the supervision, labor, equipment, components, materials, permitted sites, storage facilities, permits, tools and other resources and appurtenances necessary or proper for the performance and completion of this Contract, in the manner called for by the terms and conditions herein, and to the satisfaction of the Commission. The Contractor shall be responsible for adhering to all applicable laws, statutes, regulations, ordinances,

permits, and directives during the performance of this Contract.

The Contractor shall comply with all of the terms and conditions contained herein and which are hereby made a part of this Contract. The submission of a Bid shall be considered as *prima facie* evidence that the Bidder has visited the WWTP and MCCF and familiarized himself with and understands the conditions under which this Contract shall be awarded, performed, and administered. No letter or stipulation submitted with a Bid shall alter the terms of this Contract. (Part Two, pg. 2 of 30)

Extract from General Conditions and Instructions for Bidders or Offerors, 27. Basis for Award, Exhibit A, Amended Complaint.

27. BASIS OF AWARD: This Contract shall be awarded to the lowest, responsive and responsible certified minority Bidder who has received all approvals and made all submissions as required herein in accordance with the Commission's Minority Procurement Policy, a copy of which is attached. (Part Two, pg. 14 of 30)

WSSC MINORITY BUSINESS ENTERPRISE POLICY
Exhibit A, Amended Complaint

WASHINGTON SUBURBAN SANITARY COMMISSION
HYATTSVILLE, MARYLAND

MINORITY PROCUREMENT POLICY
(AN EXCERPT FROM THE PURCHASING MANUAL)

The Washington Suburban Sanitary Commission is committed to increasing the participation of enterprises owned by minorities in its procurement of commodities and services.

1. **Goals and Procedures.**

In order to meet this policy commitment, the WSSC will: one, increase the number of minority-owned firms responding to Commission procurement requirements; and two, increase the dollar value of awards to enterprises owned by minorities.

a. Increase Minority-Owned Firms Responding to Commission Procurement Requirements.

The Purchasing Agent and Minority Business Enterprise (MBE) Officer will actively search for and identify minority-owned firms which provide commodities and services required by the Commission. To achieve this goal, the Purchasing Agent and MBE Officer will use such organizations as the Greater Washington Business Center, the Maryland Minority Business Enterprise Certification Council (MBECC), the National Minority Purchasing Council, Inc., the Maryland Department of Transportation, the Maryland Department of General Services and other resources. The

Purchasing Agent and MBE Officer will also actively encourage such firms to bid on commodity and service contracts offered by the Commission.

b. Increase Procurement Awards to Minority-Owned Enterprises.

As a goal, the Purchasing Agent will strive to award to minority-owned firms at least 25% of the total dollar value of all procurement contracts which are awarded during a fiscal year. In order to meet this goal, the Purchasing Agent will utilize one or more of the following procedures:

1.) Direct that contracts which, in the Purchasing Agent's judgment, lend themselves to the use of subcontractors include a mandatory minority subcontractor utilization clause equivalent to at least 10% of the contract's total value.

2.) Require or recommend that a procurement contract be awarded to a minority-owned firm which has submitted a bid within 10% (inclusive) of the low bid. Approval of such recommendations will be based on the Commission Delegation of Authority for Standard Procurement actions. Minority Business Enterprise awards within 10% of the low bid do not apply when the manufacturer supplying the subject minority company also bids independently on the same contract.

3.)Require or recommend that competitive bidding of

procurement contracts be restricted to minority-owned firms. Restricting competitive bidding on contracts whose estimated value exceeds $50,000 will require the following approvals:

Estimated Contract Value	Approval Level Required
$50,000 -75,000	Materials & Procurement Division Head
$75,001-100,000	Supply & Resource Control Bureau Director
Over $100,000	Maintenance & Operations Department Director

4.) Require or recommend that procurement contracts be directly negotiated with one or more minority-owned firms. Negotiating contracts whose estimated value exceeds $50,000 will require the approval levels stated in 3.) above.

5.) Waive or reduce all or part of the Commission's bonding and/or insurance requirements for minority-owned firms (if the Purchasing Agent judges that the requirements would deny the minority-owned firm an opportunity to perform the contract which the firm has shown itself otherwise capable of performing).

6.) Recommend waiver of a bid's or proposal's corporate experience requirement for a minority-owned firm if the firm has at least a year's relevant corporate experience and the firm's principals have

has at least a year's relevant corporate experience and the firm's principals have considerable similar experience prior to forming or joining the firm.

c. The Purchasing Agent shall consider the following criteria in selecting one or more of the minority procurement procedures authorized above prior to awarding a contract under this program:

1.) Whether the procedure selected is likely to increase the number of minority-owned firms responding to Commission procurement requirements in the future.

2.) Whether the procurement selected is likely to increase the dollar value of procurement awards to minority-owned firms in the future.

3.) Whether the procedure selected is likely to further the Commission's goals under this program without unnecessarily interfering with the efficient operation of the Commission.

4.) Whether the procedure selected is the most effective alternative available which will further the Commission's goals under this program.

2. **Minority-Owned Suppliers and Distributors.**

Minority Business Enterprise awards within 10% of the low bid do not apply when the manufacturer supplying the subject minority company also bids independently on the same contract.

3. **Utilization of Non-Minority Subcontractors.**

Any minority-owned firm which is awarded a Commission contract under procedure 1.b.2.), or 3.) or 4.) above may not subcontract more than 40% of the contract value to a firm owned by a non-minority. (It is the intent of this provision to ensure that the minority contractor is the recipient of at least 60% of the contract funds.) The failure of a minority firm to abide by this subcontracting limitation may be grounds for terminating the contract in accordance with the Contract General Conditions concerning Termination for Default.

4. **Utilization of Minority Subcontractors.**

a. The failure of a non-minority-owned firm to meet a mandatory minority subcontracting utilization clause may be grounds for terminating the contract in accordance with the Contract General Conditions concerning Termination for Default.

b. Subcontractors utilized under a mandatory minority subcontracting provision of a WSSC contract are prohibited from:

1.) further subcontracting any work under the contract, or

2.) utilizing goods, equipment, services or employees procured, rented or leased from the prime contractor or a company owned by the prime contractor.

c. Subcontractors proposed for utilization under a mandatory minority subcontracting provision must be prepared to work at the time of bid submittal by the prime contractor. Prior to bid submittal by the prime contractor, the minority subcontractor must have obtained approved minority certification (as indicated below

in Section 6.b.2.), all necessary licenses, permits, insurance, etc.

5. **Request for Proposals.**

Offers received in response to a Request for Proposals (RFP) shall be subject to an evaluation procedure that awards additional points for contract participation by minority-owned firms. The number of points awarded shall be directly proportionate to the percent of minority business participation. The maximum number of points to be awarded under this procedure shall not exceed 15% of the total number of points available.

6. **Definition: Minority-Owned Firms.**

a. A minority person is defined as a member of one of the following groups: Blacks, Hispanics, American Indians, Alaskan Natives, Asians or Pacific Islanders, females or the physically or mentally disabled.

b. A minority-owned firm is defined as:

1.) any legal entity organized to engage in commercial transactions which is at least fifty-one percent (51%) owned and controlled by one or more minority persons, and

2.) a firm which has been certified as minority-owned by the Maryland Department of Transportation, Maryland Minority Business Enterprise Certification Council or the Minority Business Opportunity Commission (District of Columbia), or any governmental certification agency which substantially duplicates the requirements of the Maryland Department of Transportation and which is approved by the MBE Officer. A listing of approved certification agencies is available from the MBE office. Evaluation of proposed

certification agencies for approval will not be conducted for pending procurements.

7. **Contract Review/Audit.**

a. The MBE Officer shall have the right to periodically monitor work performed under a contract awarded under this policy to ensure compliance with all applicable provisions of this policy. The contractor and/or subcontractor shall grant the MBE Officer or his representative access to the contractor's or subcontractor's work site and place of business. Suspected instances of policy non-compliance shall be reported to the Internal Auditor and General Counsel for investigation.

b. The Internal Auditor shall perform random audits of contracts awarded under this policy to ensure compliance with all applicable provisions of this policy. Documented cases of fraud or impropriety shall be referred to the General Counsel for legal action.

8. **Goals Review.**

a. The Purchasing Agent will maintain records and statistics on contract bids and awards to minority-owned firms and prepare a quarterly report summarizing such activity for the Commission, the MBE Officer and MBE Advisory Committee. (The latter report will include a listing of all contracts above $2,500 which have been directly negotiated with a minority-owned firm.) The Purchasing Agent will also report on any problems encountered or anticipated in meeting policy goals.

b. The MBE Officer will periodically monitor procurement requisitions to assist the Purchasing Agent in identifying minority-owned firms offering services or commodities covered by those requisitions. The MBE Officer will also provide help and

assistance to minority-owned firms encountering difficulties in responding to procurement bid solicitations or in achieving certification of their minority ownership. Finally, the MBE Officer will report separately to the Commission and the MBE Advisory Committee on Purchasing's progress in achieving the goals established for awards to minority-owned firms.

c. The MBE Advisory Committee, which will include a Commissioner, the General Manager, the Purchasing Agent, MBE Officer, a representative of a minority-owned firm and a representative of a non-minority-owned firm, will be responsible for monitoring the implementation and progress of the MBE program. The Committee will also recommend to the Commission possible methods to resolve problems Purchasing may encounter in achieving the minority award goals established under this policy.

d. The Commission will conduct a public hearing annually in order to solicit public comments on the Minority Procurement Program. The Commission shall review the program annually for the purpose of determining what changes, if any, are necessary.

NOTE: The policy and procedures delineated above take precedence over applicable sections of Commission procurement policies as outlined in the Purchasing Manual.

Letter of June 7, 1988 to Sally Barkley
Exhibit C, Amended Complaint

June 7, 1988

Mrs. Sally Barkley
Purchasing Agent
IFB for Contract Number 17224
Washington Suburban Sanitary Commission
4101 Lloyd Street
Hyattsville, Maryland 20781

Dear Mrs. Barkley:

George D. Newman & Sons, Inc. (hereinafter, "Newman & Sons"), through us, their undersigned counsel, do hereby protest the bid of Hardy & Son Trucking, Inc. (hereinafter, "Hardy") in IFB for Contract Number 17224, opened May 25, 1988.

There are two broad grounds for protest. First, the Hardy bid is non-responsive. Second, an award to Hardy would be against the public interest. Please consider the following.

1. Hardy Bid Non-Responsive.

The Hardy bid is non-responsive in three major respects. First, there is no legitimate provision for storage of sludge. Second, Hardy is not a minority contractor for purposes of the bid. Third, Hardy is not qualified to do business in Maryland.

1.1. NO PROVISION FOR STORAGE OF SLUDGE.

The Hardy bid proposes a single storage facility to be constructed in King George County, Virginia under Bio-Gro Systems, Inc. Non-Discharge Certificate IW-ND-1656, which proposal is non-responsive in two respects.

1.1.1. Site Too Small.

Non-Discharge Certificate IW-ND-1656 relates to 181.5 acres of property owned by S. Dorsey Edwards, Jr.[1] By regulation in King George County, stored sludge may not be re-transported but ". . . shall be for use of the farm upon which it is located." (Article 4, Supplementary Regulations, Section 4.6, Land Application of Class A Sludge, Section 4.6.2.3.)

Assuming that the entire 181.5 acre tract would prove suitable for spreading, the maximum capacity would be approximately 15,000 wet tons over a five year period under Virginia Regulations.

The subject IFB requires capacity of 18,000 wet tons being available at all times (Part Two, Page 8).

Therefore, the Hardy bid on its face provides for inadequate storage.

1.1.1. Site Not "Permitted".

The subject IFB specifically states (in underlined language, for emphasis) that the bidder must show proof of permitted sludge storage facilities. The Hardy bid shows proof of permission to construct a storage facility. However, the storage facility has not been constructed and, under Virginia Regulations, cannot be finally certified to receive sludge until it has been inspected favorably after construction.

The term "permitted" is defined in the subject bid documents at page 5 of Part One

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[1]Substantial additional acreage nearby is also proposed under the Hardy bid. However, the additional acreage (a) has a different owner and (b) is not adjacent, being separated by a tract belonging to Lewis Ashland.

as "approved by, accepted by, satisfactory to, or permitted by the General Manager."

Surely an ephemeral, unconstructed storage facility, which may or may not come to be approved by appropriate authorities, cannot be said to satisfy such important and certain requirements as those in the subject bid documents, to the satisfaction of the General Manager.[2]

1.2. HARDY NOT A "MINORITY CONTRACTOR".

The subject procurement is set aside for minority contractors, defined by the Commission as contractors 51% owned and "controlled" by minorities.

On information and belief, for purposes of the subject procurement Hardy is not minority "controlled". Therefore, Hardy is not a "minority contractor" within the letter or the spirit of Washington Suburban Sanitary Commission's Minority Procurement Policy published as part of the subject bid materials.

1.2.1. Commission Power To Question.

According to Nathan Greenbaum, Esq., counsel to the Commission, if a contractor or bidder is certified as a minority contractor by one of the accepted certifying agencies, normally the Commission is powerless to question the

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[2]There is Washington Suburban Sanitary Commission precedent for disqualifying a bid for far less. For example, in late 1983 the low bidder for a sludge hauling contract was disqualified because he did not have his hauling permit in hand at the time of the bid. He merely had a commitment from the Commonwealth of Virginia that he would receive his hauling permit once he had a contract in hand.

certification and has not, and will not do so as a matter of policy.[3]

However, the Commission's own statement of Minority Procurement Policy (hereinafter, the "Policy") belies Mr. Greenbaum's position.

For example, the definition of a minority firm, set forth at Section 6 of the Policy, requires minority control and certification by one of the approved agencies. Had the Commission not intended to reserve to itself the right to make judgment as to "control", the conjunctive would not have been used.

In addition, Section 7 of the Policy implies a reservation of right of determination in the Commission. Section 7 imposes a duty upon the MBE Officer to monitor compliance as to minority status during a contract. Section 7 also imposes a duty of random audits upon the Internal Auditor to determine compliance. If such determination must be made during the course of a contract, surely the Commission has the same power ab initio.

Most telling, however, is the obvious observation that the Commission must have realized that a concern might be minority "controlled" for some purposes and not for others. For example, a concern might be minority "controlled" for purposes of small trucking jobs but "controlled" by another for purposes of a very large and complex contract beyond the capabilities of those

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[3]In a telephone conversation with the undersigned on May 31, 1988, Mr. Greenbaum so stated.

who are normally in "control" of the concern.[4]

Such is the case at hand.

1.2.2. "Control" in the Case at Hand.

On information and belief, Hardy is certified by the Maryland Department of Transportation, one of the Commission approved certifying agencies.

Newman & Sons does not question the bona fides of such certification or that, for some purposes, Hardy may not indeed be a minority concern.

However, also on information and belief, for purposes of the subject procurement, Hardy is "controlled" by one or more instrumentalities of the Bevard family in Prince George's County. (See Exhibit A hereto, "Summary of Material Facts about Bidder Hardy".)

1.3. HARDY NOT QUALIFIED IN MARYLAND.

Hardy & Son Trucking, Inc. is a District of Columbia corporation. It was qualified to do business in Maryland from August 26, 1985 until December 19, 1986, at which time its Maryland qualification was allowed to lapse and has not been renewed.

Qualification to do business in Maryland is a prerequisite to bidding the

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[4]Ascertaining "control" involves subjective analysis which has plagued the U.S. Small Business Administration and others. In considering "control" it is useful to look to the purpose of minority set-aside programs, namely to nurture a management and entrepreneurial class among minorities. Obtaining these decision-making skills has been likened to learning to walk in the sense that no one else can do it for you -- only by your own stumbling and repeated tries can the skill be obtained.

subject procurement. (See Paragraph 22, Part One, page 10.)

2. Public Policy Considerations.

The Commission has reserved to itself the right to reject any bidder who cannot demonstrate to the Commission "that he has the necessary competence, capability, capacity, credit, integrity, perseverance and tenacity to complete this Contract". (See Item 12, Responsibility of Bidders, Part One, page 8.)

2.1. LACK OF FINANCIAL RESPONSIBILITY.

Hardy, standing alone, does not have the financial capacity to perform. (See Exhibit A hereto, "Summary of Material Facts about Bidder Hardy".)[5]

2.2. LACK OF INTEGRITY.

Nor does Hardy have the integrity to perform. As Exhibit A makes clear, persons in nominal control of Hardy have extensive criminal records, including conviction for receiving stolen goods, grounds for debarment by the Commission's own policies.[6] In matters as sensitive to the public awareness as disposal of sewage sludge, prudence speaks for taking great care to delegate responsibility to persons who have a demonstrated record of respect for law. Hardy clearly cannot meet such a standard.

For the foregoing reasons, the bid of Hardy & Sons Trucking, Inc. in respect of IFB Contract Number 17224 must be rejected.

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[5]Any suggestion that Hardy does not stand alone goes, of course, to the "control" issue raised above.

[6]WSSC Purchasing Manual, Section 11.B.3.b.

It is so requested.

Respectfully submitted,
Smith Rollinson, by Mark Rollinson, Maryland Client Security Trust Fund Number 900007132.
Attorneys for George D. Newman & Sons, Inc.

BY: Mark Rollinson

Staff Memorandum: Proposed Contract
17224 Disposal of Blue Plains Sludge
Exhibit L, Amended Complaint

PROPOSED CONTRACT 17224
DISPOSAL OF BLUE PLAINS SLUDGE

The Contract: The proposed contract requires the disposal of approximately 400 wet tons of sludge a day generated by the Blue Plains Wastewater Treatment Facility. The contractor must haul approximately 200 wet tons a day to Site II and to haul and dispose of the remaining estimated 200 wet tons a day at contractor-secured permitted sites. The contract term is three years, ten and a-half months.

The Solicitation: Bids on the contract were solicited from only minority-owned firms. Each bidder was required to include with his bid a number of submittals including "complete copies of all permits required for use in the performance of this contract," specifically:

1. complete copies of disposal permits covering sites with a total capacity of at least 18,000 wet tons,
2. complete copies of permits for storage facilities with a total capacity of at lease 18,000 wet tone (or an alternate plan to "store" at least 18,000 wet tons), and
3. any haul permit required to perform the contract.

Initial Bid Evaluation: Three bids were received on the contract. Following evaluation of the bids, staff recommended award of the contract to Hardy and Sons Trucking. Hardy rendered the lowest bid. The bid also appeared to be the only responsive bid, except that it failed to include county disposal and storage permits which allegedly Hardy needed to use his

State permitted disposal and storage sites. Consequently, the award recommendation included a proviso that the staff verify that either the county permits were not required or that the required permits were issued prior to the bid closing date of May 25. At its June 29 meeting, the Commission remanded the contract to staff for further study.

Subsequent Bid Evaluation: Following the Commission's action, the staff provided Hardy an opportunity to clarify its bid, to specifically submit the allegedly required county permits. The two other bidders, George D. Newman and Sons, Inc. and MTI Construction Company, Inc. whose initial bids failed to include all required submittals were also given a similar opportunity to clarify their bids. Each bidder responded to the staff's bid clarification request. What follows is a summary of the staff's evaluation of each firm's initial bid and its subsequent bid clarification:

> Hardy: The lowest priced bid, nearly 11% below the lowest price solicited nearly three and a-half years ago. Hardy's bid also now includes all required submittals, including a county sludge disposal permit issued in April 1986 and a "Zoning and Building Permit" covering the State permitted storage site issued June 10, 1988, about two and a-half weeks after the bid deadline date. The latter permit also, at least theoretically, effectively reduces the capacity of the proposed storage facility to an estimated 15,000 wet tons, slightly under the minimum required 18,000 wet tons. Hardy is also now properly registered with the Maryland State Department of Assessments and Taxation, a

contracting rather than a bidding requirement.

Newman: Newman's bid price is $498,080 above Hardy's base price and $653,730 above Hardy's prompt payment discount price. Newman's bid includes all submittals, except a State permit required to haul sludge to Site II. Newman's attorney acknowledged in his response to the bid clarification request that Newman did not have the requested haul permit. Subsequently, following the deadline date established for responses to WSSC's bid clarification request, Newman's attorney delivered the requested haul permit, a haul permit issued of course after the bid closing date.

MTI: MTI's bid price is $812,210 above Hardy's base bid price. Like Hardy, MTI offers a prompt payment discount price, 2-1/2% versus Hardy's 2%. MTI's prompt payment price is $752,780 above Hardy's prompt payment price. MTI's bid now includes all required submittals. However, the bid requires further clarification regarding MTI's specific sludge storage plans.

Summary and Recommendation: The staff recommends award of the contract to Hardy. Hardy has submitted the lowest priced bid. The bid price is also well below that submitted by the other two bidders and well below that secured the last time the same contract was bid. Hardy's bid price is also the only fiscally acceptable price submitted by any bidder. Hardy's bid also is responsive with the possible exception of the late issuance of the county storage permit, whose issuance

appears to have been simply a formality and the local restrictions on the amount of sludge which can be effectively stored in the storage facility, which restrictions the county may or may not be able to enforce.

Alternate Recommendation: If the Commission is not inclined to support award of the contract to Hardy, the contract should be rebid. The other two bidders have submitted fiscally unacceptable prices ranging from $498,080 to $812,210 above Hardy's bid price. Newman also failed to submit the required Site II haul permit by the deadline date established for bid clarifications. The contract should additionally be rebid on the open market and should include a mandatory minority subcontracting requirement of 30-40%, with the WSSC of course reserving the right under its Minority Procurement Policy of awarding the contract to a minority prime contractor who submits a bid within 10% of the low bid.

Letter of June 16, 1988 to Mark Rollinson returning protest package.
Exhibit K, Amended Complaint

June 16, 1988

CERTIFIED MAIL NO. 978194
RETURN RECEIPT REQUESTED

Mr. Mark Rollinson
Smith Rollinson
Attorneys at Law
603 King Street
Alexandria, Virginia 22314

Re: Protest Letter dated June 7, 1988 of IFB Contract No. 17224

Dear Mr. Rollinson:

I have reviewed your letter, dated June 7, 1988, and the above-referenced Invitation for Bids (IFB). Your letter protested the bid of Hardy and Son Trucking, Inc., and was submitted on behalf of your client, George D. Newman and Sons, Inc.

Although I appreciate your concern over the Hardy's bid, the submission of the bid is not a protestable matter. At this time, the bids received in response to the IFB are under evaluation and, to date, no award has been made. Therefore, I'm returning your protest package to you for possible resubmission at a later date.

If you have any questions, please call me at (301) 699-4839.

Sincerely,
BY: Sally C. Barkley OPPO, C.P.M.
Purchasing Agent

SCB:ah
Enclosure

Letter of June 22, 1988 to Cortez A. White
Director of Maintenance and Operations
Exhibit L, Amended Complaint

June 22, 1988

Cortez A. White
Director of Maintenance and Operations
Washington Suburban Sanitary Commission
c/o Purchasing Agent
4101 Lloyd Street
Hyattsville, Maryland 20781

Dear Mr. White:

This is to appeal the denial by the Purchasing Agent of a protest filed on June 7, 1988 on behalf of George D. Newman & Sons, Inc. against Hardy & Son Trucking, Inc. (a/k/a "John Hardy & Son, Inc.", "Hardy & Sons", and "Hardy & Son, Inc.", hereinafter "Hardy") in respect of IFB for Contract Number 17224, a copy of which protest is attached to this letter along with a copy of the June 16 advice of denial.

While the Purchasing Agent has characterized the rejection of the subject protest as being based upon timeliness, such rejection is both ill founded and tantamount to a rejection on the merits.

The error in the timeliness argument is explained in our response to the Purchasing Agent, a copy of which is enclosed.

The timeliness rejection being tantamount to rejection on the merits is obvious because, among other things, under your Rules, Newman & Sons would be prohibited from protest after award. The bases for protest became known to Newman & Sons shortly after bid opening on May

25, 1988. By your Rules, bases for protest must be submitted within 15 days after being known or knowable with reasonable diligence (see, for example, Paragraph 34.A. of Part One of the procurement documents). The 15 day period has expired.

Therefore, our protest has been denied and we hereby appeal.

Respectfully submitted,
BY: Mark Rollinson

cc w/o enclosures: The Commission and each
Commissioner
Kevin G. Newman
Earl Frazier

Letter of July 1, 1988 to Mark Rollinson from Cortez A. White, Exhibit M, Amended Complaint.

July 1, 1988

Mark Rollinson, Esquire
Smith Rollinson
603 King Street
Alexandria, VA 22314

Re: IFB, Contract Number 17224
Sludge Hauling and Disposal

Dear Mr. Rollinson:

This is in response to your correspondence dated June 22, 1988, in which you have appealed the denial, by the Commission's Purchasing Agent, of a protest filed June 7, 1988 on behalf of George Newman and Sons, Inc. After careful review and consideration of the package sent, as well as the referenced IFB, I have concluded that the Purchasing Agent responded properly in her June 16, 1988 denial to accept your protest under the contractual remedies provided by Commission policy.

Section 11 of the WSSC Purchasing Manual states in part, "Any actual or prospective bidder, offerer, or contractor who is aggrieved in connection with the solicitation or award of a contract* may protest. . ." (underlining in original text). It is obvious that your protest is not on the solicitation but on the anticipatory award of Contract No. 17224 to the apparent low bidder. At the time of your protest, investigation on the responsiveness of prospective bidder(s) was in progress by the Commission and no recommendation, let alone award, had been made. Therefore, no protestable action has been taken. As a

result, you are premature in your action and must wait until a decision has been made before an official protest may be accepted.

It is the Commission's responsibility to examine all information available to determine the responsiveness and responsibleness of bidders during bid evaluation prior to recommendation for award. Therefore, the information and areas of concern you provided in your original protest have been examined as part of our evaluation prior to making a recommendation for award.

Mark Rollinson, Esquire
July 1, 1988
Page Two

As you are aware from your attendance at the July 29 Commission meeting, the Commissioners did not approve the original recommendation of award to the apparent low bidder. The procurement action was remanded to staff for closer examination. . .especially of the alleged responsiveness shortcomings you argued exist in the apparent low bidder's ability to meet the IFB requirements. Once this reexamination is completed, staff position will be presented to the Commission.

If, when this is returned to the Commission for action, the apparent low bidder is still recommended for award and, if such an award is approved, you will be afforded fifteen (15) days from that date to resubmit your protest if you still feel it is valid.

Your conclusion that, ". . .under your rules, Newman and Sons would be prohibited from protest after award." is in error. Though information may be provided following a bid opening to assist the Commission in its bid evaluation process, a formal protest is not possible until a recommendation is completed

and an award has been made. To suggest that Commission rules would prohibit a bidder from protesting an award (because it was not madewithin fifteen (15) days of the bid opening) is in itself the real "obvious, logical absurdity." As far as your specific appeal on the decision rendered relative to IFB Contract No. 17224, as presented for your client, this is the final decision of this Commission in this matter.

Sincerely,

By: Cortez A. White
Director, Department of
Maintenance and Operations

CAW/nr

cc: Nathan Greenbaum, Esq.
Vicki Webb, Esq.
Joseph McNerney
Will Bowles
Sally Barkley